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IN THE

Supreme Court of the United States

No. 79-1685

October Term, 1980

ROBERT BREITNER and LUELLA BREITNER,
Petitioners,

–v–

RICHARD HARRIS, d/b/a RICHARD HARRIS BUILDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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OCTOBER TERM, 1980

No.

ROBERT BREITNER and LUELLA BREITNER,
Petitioners,

-v-

RICHARD HARRIS, d/b/a RICHARD HARRIS BUILDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Robert Breitner and Luella Breitner, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered on December 10, 1979.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio entering judgment *non obstante veredicto*, is not officially reported, but is reprinted at App. (a -a).[1] The opinion of the United States Court of Appeals for the Sixth Circuit is not officially reported but is reprinted at App. (a -a).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 10, 1979. Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 28, 1980. This Petition for writ of certiorari was filed within ninety (90) days of that date; 28 USC §2101(c); *United States* v. *Healy*, 376 U.S. 75, 77-80 (1964).

QUESTIONS PRESENTED

1. Have we not reached the state of development in the evolution of our ordered scheme of liberties that it is:

   A violation of the dictates of the Seventh Amendment when the District Court enters judgment *non obstante veredicto* rendering nugatory the verdict of a 12 person jury in a bifurcated trial which decided, under proper instructions and in the total absence of any evidence of damages or of the nature and extent of the injury which was sustained, and in the total absence of any argument which could be claimed to appeal to passion, prejudice or sympathy, that:

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1. The Appendix to this petition shall at all times herein be referred as "App.".

a. the conduct of the Petitioner was reasonable in the place, time and circumstances and under the conditions then existing; and,

b. the Respondent had failed to discharge its burden of proof in establishing its affirmative defenses of contributory negligence and assumption of the risk,

thereby insulating a proven tortfeasor from liability?

2. Does not the Seventh Amendment forbid a U.S. Circuit Court of Appeals to go afield and reexamine the factual record, and to reevaluate the reasonableness of the conduct of the parties, in order to defeat the verdict of the jury in a diversity case?

3. Is it not error requiring reversal in the exercise of the supervisory jurisdiction of this Court when a District Court regards itself bound under *Erie R. Co.* v. *Tompkins*[2] by an unreported "decision and journal entry" of an intermediate state appellate court which is wholly lacking in precedential value in the State in which it sits and which is demonstrably contrary to the law as articulated by that State's court of last resort?

CONSTITUTIONAL PROVISIONS INVOLVED

The following provision of the Constitution of the United States applies hereto:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of the trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
>
> U.S. Constitution, Amendment VII.

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2. 304 U.S. 64 (1938).

STATUTORY PROVISIONS INVOLVED

The following provision of the Judicial Code of the United States applies hereto:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
>
> 28 U.S.C. § 1652 (1956).

STATEMENT OF THE CASE

In early 1972, Respondent Richard Harris, d/b/a Richard Harris Builders, undertook the construction of a multi-million dollar motel-office-shopping complex in Toledo, Ohio, which came to be called the Sheraton-Westgate. Respondent, (who had only engaged in residential home construction previously), acted as owner and as developer and general contractor for the erection of the structure and provided job superintendence with his own personnel. Harris Builders contracted with some 30 different firms to perform various aspects of the work and also contracted with the Seaway Scaffolding Company to provide tubular steel frame scaffolding and scaffold planks.

The job superintendent for Harris Builders, George Henry, inspected the scaffolding between uses by the various subcontractors, conducted daily safety inspections of the entire project, guided governmental inspectors on their rounds during periodic inspections, and had the authority to, and in fact did, order correction of scaffolding deficiencies. He instructed project personnel in what he considered to be safe scaffold erection on at least two occasions. There was also evidence, however, that the scaffolding was generally set up by laborers, apprentices, "usually the cheapest help there that was available." In consequence, it was frequently erected without

double-planking, cleated planking, guardrails, toeboards or other reasonably necessary safety precautions.

On October 3, 1972, Petitioner Robert Breitner, an employee of the carpentry subcontractor on this project was engaged in the installation of window frames. He was working from the inside, and an apprentice, John Nearing, was working from the scaffolding. When Nearing experienced difficulty in making a cut on one of the window frames, he asked Petitioner for assistance. Petitioner stepped through one of the window wells onto the scaffolding and was engaged in making the cut when the scaffold plank broke. Nearing was able to grab the frame; petitioner fell nearly two stories, sustaining multiple spinal column and rib fractures and at the present time has permanent, irreversible and disabling injuries.

This diversity action was commenced in the United States District Court for the Northern District of Ohio on October 17, 1973, to enforce liability against Respondent and the Seaway Scaffolding Company. The case was tried twice. The first trial began on April 26, 1976, and extended to May 6, 1976. At the conclusion of plaintiffs' case-in-chief, the District Court granted a motion for directed verdict in favor of the Seaway Scaffolding Company and against the Petitioners. The Court of Appeals upheld this ruling and Petitioners do not seek review of this issue before this Court. At the conclusion of all of the proofs, the jury was charged, and began its deliberations, but was unable to reach a verdict. The District Court declared a mistrial and discharged the jury.

The second trial—this time, a bifurcated issue trial separating liability and damages—was commenced on June 14, 1976. The liability phase of the second trial extended until June 16, at which time the jury was charged and rendered a liability verdict for the Petitioners. The District Court then permitted the damages phase of the trial to begin and evidence of Petitioners' damages was presented on June 16. On June 17, the jury returned a verdict of $236,000.00.

On February 15, 1977, the District Court entered an unreported memorandum opinion and order setting aside the verdict of the jury in the total absence of any claim, or any evidence, of passion, prejudice, corruption, improper influence of the jury, or improper argument. The principal focus of the District Court's opinion was that it was bound by an unreported "decision and journal entry" of the Ohio intermediate appellate court in Toledo in a case which the District Court said was "factually on all fours with the present case . . ." (App. a) and which had held that an owner or general contractor owes no duty to safeguard the employee of a so-called independent contractor. The District Court also said Petitioner was guilty of contributory negligence as a matter of law.

The Court of Appeals for the Sixth Circuit held in an unreported opinion that the District Court was not bound by the State court "decision and journal entry," that the State court case was not factually foursquare with the case at bar, but that Petitioner was guilty of contributory ngligence as a matter of law.

This Petition follows.

REASONS FOR GRANTING THE WRIT

1. *The Decision of the Court of Appeals contravenes the fundamental guarantees of the Seventh Amendment.* This Court has granted certiorari many times to vindicate Seventh Amendment rights. "Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Scheidt, 293 U.S. 474, 486 (1935), quoted with approval in Beacon Theaters* v. *Westover*, 359 U.S. 500, 501 (1959). In *Wilkerson* v. *McCarthy*, 336 U.S. 53, 70, 71 (1949), this Court said: "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function is passing on dis-

puted questions of fact and in drawing inferences from proven facts has been respected." This Court has been willing to enforce the strictures of the Seventh Amendment in diversity cases as with statutory actions arising by Act of Congress. *Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956) (*per curiam*); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959).

In the case at bar, the function of the jury was not given the respect which *Wilkerson* v. *McCarthy, supra*, requires, and both the spirit and letter of the Reexamination Clause were violated. In *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935), this Court said with respect to the right of trial by jury:

> The amendment not only preserves that right but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of re-examination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."
>
> The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court.
>
> [Footnote omitted].

Furthermore, in *Int'l. Terminal Operating Co.* v. *N.V. Nederl. Amerik. Stoomv. Maats.*, 393 U.S. 74 (1968) (*per curiam*), this Court specifically held that the question of the reasonableness of one's conduct is one which the Seventh Amendment requires be decided by a jury.

In *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944), and in *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108, 114-115 (1963). This Court reiterated:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the

> case away from the jury on a therory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade*, 135 U.S. 554, 571, 752; *Tiller* v. *Atlantic Coast Line R. Co., supra*, 68; *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 353, 354. *That conclusion whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*
>
> [Emphasis added].

If *stare decisis* has meaning, if these precidents retain any vitality, they should be used to enforce the principle in this case.

2. *The utilization of an unreported "decision and journal entry" of an intermediate State appellate court to overturn the verdict of a jury threatens to undermine the foundation of the Erie doctrine*. The District Court, in its opinion, found that it was bound by the decision of the Sixth District Court of Appeals for Lucas County in a State case, *Cuppy* v. *Lathrop Co.*, C.A. No. L-75-170 (Decision and Journal Entry, April 16, 1976). The U.S. Court of Appeals for the Sixth Circuit held: "We agree with the plaintiffs that *Cuppy* was not binding upon the district court here. However, we do not find that it was error for the Court to consider *Cuppy*." (App a - a). Appellate approval of *Cuppy* poses extremely troublesome *Erie* questions.

While it is true that a Federal Court in a diversity case is

obligated under the Rules of Decision Act, 28 USC §1652 and the *Erie* Doctrine, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), to apply substantive rules of state law as construed by the highest court of that state and that two years after *Erie*, this Court held that the obligation extended to decisions of intermediate appellate courts as well, *West* v. *A. T. & T. Co.*, 311 U.S. 223 (1940); and *Six Cos. of California* v. *Joint Highway District*, 311 U.S. 180 (1940); *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940), this obligation is not without exception.

Thus, in *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948), this Court held that a reviewing Fourth Circuit was not obligated to follow the only South Carolina opinion on point because that opinion had little, if any, precedential value. Chief Justice Vinson emphasized two factors:

> a. the decision was not published or digested and thus was generally inaccessible to other members of the bench and bar;
>
> b. the decision did not require conformity by other courts in the state.
>
> 333 U.S. at 160-62

Measured against the *King* benchmark, the *Cuppy* decision is not proper judicial precedent which may bind a District Court in a diversity case. Plaintiffs respectfully point out that the following features of the *Cuppy* decision:

Ohio's eighty-eight counties are organized into eleven judicial districts. Ohio Const. Art. 4 §3; Ohio Rev. Code Ann. §2501.01 (Page's 1968). The opinions rendered by a district court of appeals are not binding on its sister courts of appeals. *Hogan* v. *Hogan*, 29 Ohio App. 2d 69, 77 (1972).

The practice in the Sixth District Court of Appeals is to issue: (a) official opinions; (b) unofficial opinions; (c) unreported opinions; (d) decisions and journal entries; (3) procedural orders. Of these, only the opinions are indexed in any

way other than by the surnames of the parties. Unreported opinions are available at the Toledo Law Association library and the University of Toledo Law library and are collected by the larger law firms in Toledo. Official opinions and unofficial opinions are freely available, digested and indexed. Decisions and journal entries and procedural orders are largely unavailable to the bench and bar of the State of Ohio at large including practitioners in metropolitan Toledo.

In this connection, Chief Justice Vinson speaking for a unanimous court in *King* emphasized the inherent danger in requiring a Federal court to follow unreported "precedent" in a diversity case, 333 U.S. at 161-162:

> Secondly, the difficulty of locating Common Pleas decisions is a matter of great practical significance. Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina's forty-six counties. To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered. [footnote omitted]

Although the *King* Court dealt with an unreported opinion of a court of general trial jurisdiction in South Carolina, the logic of the *King* Court's analysis and the principles which the *King* Court articulated compel the conclusion that the criteria of availability and conformity should apply to the *Cuppy* decision and that the same result should obtain.

Moreover, the Ohio General Assembly has specifically enacted a statute depriving unreported cases of precedential effect. Thus, Ohio Rev. Code Ann. §2503.20 (Page's, 1953) reads in pertinent part as follows:

> After August 15, 1919, all such cases must be reported in accordance with this section before they shall be recognized by and receive the official sanction of any court.

Although the Sixth Circuit held that the Ohio statute is directory and not mandatory in *Gustin* v. *Sun Life Assur. Co.*, 154 F.2d 961 (6th Cir. 1946) *(on rehearing)*, Ohio appellate courts have held that unreported opinions are entitled to no weight. *Bevan, Admx.* v. *Century Realty Co.*, 64 Ohio App. 58, 66 (1940). *Cf. National Surety Corp.* v. *Blackburn*, 62 Ohio L. Abs. 158, 106 N.E.2d 781 (App. 1951).

The correct view is undoubtedly that unreported intermediate appellate court opinions are entitled to some weight, but not as much as accorded to official reports, since trial and appellate judges should not be required to till already planted soil. But such opinions are to be distinguished from the "decision and journal entry" signed by the Court in *Cuppy*. If anything, the unreported opinions which contain at least some legal reasoning and analysis should be preferred over the decision and journal entry which normally only announces the results reached in a form similar to a minute order. Indeed, the fact that the Lucas County Court of Appeals chose that form rather than a written opinion suggests that the *Cuppy* court itself did not view the matter as precedent setting.

The distinction becomes important because that decision of the Sixth District Court of Appeals in *Cuppy* stands in stark and open conflict with *opinions* issued by the First District Court of Appeals in *Nutter* v. *C'Nati Gas & Elect. Co.*, C.A. No. 74-551 (1st Dist. App. December 13, 1974) *(per curiam), motion to certify denied*, S. Ct. No. 77-99 (1977) and by the Second District Court of Appeals in *Blakely, Admx.* v. *Charles H. Shook, Inc. (I)*, C.A. No. 4337 (February 7, 1974) and in *Blakely, Admx.* v. *Charles H. Shook, Inc. (II)*, C.A. No. 4960 (August 21, 1976).

More importantly, the decision of the Sixth District Court of Appeals in *Cuppy*, insofar as it is read to uphold a finding of contributory negligence as a matter of law violates the rule of law established by the Ohio Supreme Court in *Lazar* v. *Cleveland Electric Illuminating Co.*, 43 Ohio St.2d 131 (1975), and *Blair* v. *Goff-Kirby Co.*, 49 Ohio St.2d 5 (1976). *Cf. Briere* v.

Lathrop Co., 22 Ohio St.2d 166 (1970), that contributory negligence is an issue "uniquely tailored to the jury function." *Lazar* v. *Cleveland Electric Illuminating Co.*, *supra*, 43 Ohio St.2d at 144.

Sound judicial policy requires that unreported decisions be given neither binding nor persuasive effect, and that any citation to such decisions should be precluded. R. Leflar, *Appellate Judicial Opinions* (1974) page 313, citing, Seligson & Warnlof, *The Use of Unreported Cases in California*, 24 Hasting L.J. 37 (1972). Dean Leflar lists the reasons for such a rule as follows, R. Leflar, *supra* at p. 319:

> The reasons for requiring a rule of non-citation are many:
>
> 1. It is unfair to allow counsel, or others having special knowledge of an unpublished opinion, to use it if favorable and withhold it if unfavorable.
> 2. Cost will be reduced by eliminating the need to obtain and examine the mass of opinions that are not designated for publication.
> 3. The absence of a non-citation rule would encourage the inclusion in opinions not designated for publication of facts and details of reasoning, thus frustrating the purposes underlying non-publication.
> 4. Cost and delay of cases appealed only because they are apparently at odds with unpublished opinions can be reduced.
> 5. Great difficulty, if not impossibility, would be involved in determining whether an unpublished opinion has been overruled.

In addition, *State* v. *George*, 50 Ohio App.2d 297 (1975) presents an example of just the sort of difficulties peculiar to unreported cases. In *State* v. *George*, *supra*, the Franklin County Court of Appeals found that the trial court applied correctly the law set forth in the unreported *Peltier* v. *Koscot Interplanetary*, No. 72-AP-220 (November 14, 1972), but that "due process' required reversal of the defendants' conviction because although the *Koscot* case was binding, the defendant

was not given "fair notice" of its existence, 50 Ohio App.2d at 312-313. It is respectfully submitted that judicial decision-making should not hinge on such nebulousness as what is or is not "fair notice" of an unreported decision.

In consequence, such unreported cases which are clearly violative of the precepts articulated by Chief Justice Vinson in *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948) should not, in any sense, form the foundation for the application of a state's substantive law by a United States District Court for *Erie* purposes. Even tacit approval of such a practice by this Court would lead to untold havoc in both Federal and State practice.

These considerations militate heavily against judicial acceptance of *Cuppy* by a Federal Court. Adherence to *Cuppy*, in effect, widens the division among district courts of appeals in Ohio and unnecessarily enhances an unreported decision otherwise unlikely ever to be followed by another Ohio court. Moreover, the adoption of *Cuppy* as an authoritative statement of Ohio law elevates county of residence to a position of importance in the determination of forum choice previously unknown in Ohio. In short, adherence to *Cuppy* does nothing to promote the uniformity of substantive law in Ohio.

On the contrary, utilization of *Cuppy* for *Erie* purposes produces exactly the result reached here: a Federal appellate court applying substantive state law has adopted a position in conflict with the Supreme Court of that State and a position which violates the public policy of that State as articulated by the Supreme Court of that State:

> To begin with, the goals of the tort system are probably better served by a jury determination of the facts than by judge-made determinations of law.
>
> * * *
>
> As Dean Prosser says, in doubtful cases questions should be sent to the jury "because the public insists that its conduct be judged in part by the man in the street rather

> than by lawyers, and the jury serves as a shock absorber to cushion the impact of the law [footnote omitted].
>
> *Blair* v *Goff-Kirby Co.*, *supra*, 49 Ohio St.2d at 9.

In this case, as the Supreme Court of Ohio emphasized in a similar case, *Giovinale* v. *Republic Steel Corp.*, 151 Ohio St. 161, 171-172 (1949): "plaintiff . . . was not a free agent walking on a sidewalk in broad day light. He was a workman, under orders performing a difficult job under difficult conditions." Plaintiff's conduct was measured by the jury with these circumstances factually supported in the record and under proper instructions from the District Court.

Yet, despite these clearly authoritative statements of the substantive law of Ohio and the public policy of Ohio as stated by the Supreme Court of Ohio, and even as the Ohio General Assembly was adopting comparative negligence, Ohio Rev. Code Ann. §2315.19 (effective June 20, 1980)[3], the District Court and the Court of Appeals which upheld it, was led astray by what can only be fairly viewed as a judicial aberration.

Finally, this Court must consider the practical impact which would flow from even tacit approval of the District Court's reliance on the *Cuppy* decision. Immediately, large law firms with their not insubstantial resources and research capabilities are given a significant advantage over sole practitioners and smaller firms. Unfair tactical advantages over an opponent could be achieved by unveiling a governing decision at a critical moment in trial, such as during argument on a motion for directed verdict, and the unfortunate recipient would have little or no chance to recover from such a blow to his or her case. No matter how conscientious counsel might be in undertaking to research any given issue in a case, there could be no assurance that such research would ever be com-

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3. Cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 542, n. 18 (1941).

prehensive enough or complete enough if an opponent could cite an unreported and otherwise unavailable "decision and journal entry" which would then become binding on a District Court. But the spectre envisioned by Chief Justice Vinson in *King* poses difficulties beyond those faced by trial counsel. A virtual octopus of uncertainty and difficulty for other District Courts in Ohio, for the Sixth Circuit on review, and, ultimately, for this Court in attempting to analyze the substantive law of Ohio.

The net effect is to produce consequences which have a destructive influence on the *Erie* doctrine, which preclude the effective application of substantive State law in Federal courts, and which threaten the comity that lies at the heart of "Our Federalism." *Younger* v. *Harris*, 401 U.S. 37, 43-45 (1971).

The utilization of unreported case law not only gives body to the spectre envisioned by Chief Justice Vinson but also provides the spawning ground for exactly the kind of capricious injustice which occurred in the case at bar. The procedure followed here is a dangerous precedent: the *Cuppy* case is unreported; the District Court's opinion is unreported; the opinion of the Sixth Circuit is unreported. On an important question of law a virtual "fifth dimension" has been created: a body of law surrealistically mirroring the official and reported substantive law of Ohio but which is not a part of it and which fails to accurately reflect it. Such judicial decision-making emasculates the doctrine of *stare decisis* which is the foundation of the common law and robs the law of the certainty and morality with which it is infused. Moreover, this practice is totally out of harmony with the thoughts and customs of a democratic people, and the occurrence of this practice can only exacerbate the already jaundiced eye with which the public views the administration of justice. This Court must not countenance such a phenomenon.

For all of these reasons and to prevent the spread of this practice to any other State or territory, this Court should

grant this writ to take the appropriate corrective action necessary to ensure a continuing commitment to *civil* due process.

3. *This Court has granted certiorari to avert the miscarriage of justice.* In *Montana* v. *Kennedy*, 366 U.S. 308, 309 (1961), certiorari was granted "in view of the harshness of the result entailed." In the exercise of its discretion whether to grant or deny certiorari, this Court may properly consider not only the impact of this case on the lives of the individuals concerned, but also the influence of this case on the level of safety and health protection to be afforded construction workers throughout the State of Ohio by project owners and general contractors. Cf. *Funk* v. *General Motors Corp.*, 392 Mich. 92, 220 N.W.2d 643 (1974); *Shannon* v. *Howard S. Wright Constr. Co.*, 592 P.2d 438 (Mont. 1979). Culpable wrongdoers who refuse to spend the necessary monies to establish and enforce effective and professional accident prevention programs on construction sites of the scope involved here should not be insulated from liability, *particularly* in the teeth of a contrary finding of the facts by a trial jury.

The fundamental purpose of the tort law is the prevention of accidents and the deterrence of further injury. It is only when the law fails in that regard that the secondary and subsidiary function of compensating the tort victim arises. As Justice Cardozo wrote in *Pokora* v. *Wabash Rwy. Co.*, 292 U.S. 98, 104-106 (1934): "Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life." The duty of the jury as "the conscience of the community" *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968), extends to civil cases as well as criminal ones. It is the role of the jury to be the final arbiter of those standards measured by such facts and it is not for an appellate court to apply "rules artifically developed, and imposed from without." *Id.*

The opinion of the Court of Appeals in the case at bar defeats the essential purpose of the tort law, demeans the role of the jury as the conscience of the community in the estab-

lishment of a standard of reasonable care for such circumstances, and promises impunity to tortfeasors who inflict serious injury or death and who are unwilling or unable to spend the time and money to prevent construction accidents.[4] Such a decision should be rectified because it affects the lives and livelihoods of many construction workers and their families and not merely that of the Petitioners.

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4. Historically, the construction industry has presented an inherently hazardous work environment. In 1971, the year before the incident in the case at bar occurred, 2800 construction workers were killed and another 240,000 suffered disability injury of a work force of only four million. National Safety Council, *Accident Facts* (1971 ed.),23. Year after year, of the 42 industries monitored by the Council, the construction industry has consistently turned in the worst accident severity record and the worst accident frequency record, outdistanced only by deep-shaft mining, both coal and non-coal mineral.

Courts, of course, can take notice of social science facts and have done so on many occasions. As Judge Learned Hand pointed out over sixty years ago in *Parke-Davis & Co.* v. *H. K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911), courts have a duty to provide themselves with the best information and expert opinion available on technical subjects:

> How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.

See also, Muller v. *Oregon* 208 U.S. 412, 419 (1908); *Brown* v. *Board of Education of Topeka, Kansas*, 347 U.S. 483, 494, n.11 (1954).

CONCLUSION

For the reasons stated above, this Court should grant certiorari to review important Constitutional and Federal questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

DOCKET ENTRIES

(U.S. District Court—Northern Distict of Ohio)

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: Mark Schalchet, Clerk
U.S. District Court
Northern District of Ohio
By: /s/ M. B. Lewis

1973

October 17. Bill of Complaint and Demand for Jury, filed.

October 17. Civil Cover Sheet, filed.

October 17. Interrogatories to Deft. Richard Harris, Builders, filed.

October 17. Summons issued. 1 Orig. with 2 copies summons with 2 copies complaint and 2 copies of Interrogatories to U.S. Marshal Office.

November 1. Motion by defend. R. Harris for an extension of time to Nov. 26, 1973 to move, plead or answer filed. Mailed 11-1-73.

November 1. Order granting motion of defend. Harris for extension of time to Nov. 26, 1973 to move, plead or answer filed. DJY,J. Copies 77d to Philo & Raker.

November 16. Stip. & order for extension of time to 12-19-73 for defend. Seaway Scaffold Co. to move or plead, filed. DJY,J. Notice waived.

November 26. Answer and Cross-claim of Deft. Richard Harris, filed. Copies mailed.

December 3. Summons returned, executed and filed. Richard Harris, Richard Harris Builder served 10/20/73: Theodore Markwood, Atty. for Seaway Scaffold Co., Inc. served 11/11/73. Marshal's fees $7.20.

December 11. Approved Application for extension of time for Deft. to file answers to pltfs interrogatories to Jan. 4, 1974, filed. DJY. 77(d) copies to Raker, Cox and Philo, and Green.

December 19. Answer of Deft. Seaway Scaffold Co. to complaint of Pltfs and Cross-claim of Deft. Richard Harris and cross-claim of deft. Seaway Scaffold Co., against deft. Richard Harris, filed. Copies mailed.

1974

January 4. Answer of Deft. Richard Harris, Builders to Pltfs' interrogatories, filed.

February 15. Answers of Deft. Seaway Scaffold Co., Inc. to Interrogatories of Pltfs, filed.

December 5. Notice of pretrial conference on Jan. 7, 1975 at 10:30 A.M. mailed to all counsel of record.

December 30. Trial Brief of Deft. Richard Harris, etc., filed. Copies mailed.

1975

January 10. Order pretrial, filed. DJY 77(d) copies to all counsel. Estimated trial time 4 days. Trial as 1st backup case on Monday, June 23, 1975. Jury of 12 with 3/4 concurrence.

April 11. Not. trial date of 6/23/75, fld. mld.

June 10. Oral notf. re trial date. (Not. mld.)

October 22. Order pretrial, filed. DJY 77(d) copies to all counsel. Estimated trial time 4 days. Trial date Monday, April 26, 1976. Jury of 12 with 3/4 concurrence.

1976

March 16. Requests for admissions to deft. Richard Harris, Builders; Requests for admissions to deft. Seaway Scaffold Co., filed. Copies mailed.

March 29. Deft. Harris Motion for leave to file answer to cross-claim, filed.

March 29. Answer of deft. Richard Harris to crossclaim of deft. Seaway Scaffold Co. LODGED.

April 12. Pltfs. notice to take deposition of Robert I. Fikkel, M.D., filed. Copies served.

April 12. Pltfs. Notice to take deposition duces tecum of Richard Harris, filed. Copies served.

April 12. Ordered that Deft. Harris may file his answer instanter to cross-claim of deft. Seaway Scaffold Co., Inc., filed. DJY Copies mailed.

April 12. Answer of Deft. Richard Harris to Crossclaim of deft. Seaway Scaffold Co., filed. Copies mailed.

April 14. Deft. Notice of depositions upon oral examination, filed.

April 14. Answers of deft. Richard Harris to request for admissions, filed. Copies mailed.

April 15. Answers of Deft. Seaway Scaffold Co., Inc. to pltfs' requests for admission filed. Copies mailed.

April 21. Pltfs. exhibit list fld. c.m.

April 22. Pltfs' trial brief, filed.

April 22. Deft. supplemental trial brief, filed. (from Lucas County 6th circuit)

April 23. Pltf's proof of service of trial brief, filed.

April 23. Deposition of Robert I. Finkel, M.D., filed.

April 23. Deposition of Richard E. Harris, filed.

April 23. Deposition of Robert I. Finkel by *Video tape*, filed.

April 26. Pltf's proposed instruction No. 1, filed.

April 26. Pltf's proposed Voir Dire, filed.

April 26. Trial Brief of Deft. Seaway Scaffold Co, Inc., filed.

April 26. Min of roc. filed. Jury impaneled and sworn. Opening Statement made.

April 27. Min of Proc. filed. Trial by the jury resumed. Test. of Pltf. begun. Court adjorned until 4-29-76.

April 29. 6 summons; subp. ret. EXC. to: George Henry 4/16/76; Harris - 4/16/76; Blair - 4/19/76; Nehring - 4/23/76, Med. Records Lib - 4/23/76; Med. 4/23/76.

May 3. Min. of Proc. filed. Trial by jury resumed. Test. of Plft. cont. Court adjourned.

May 5. Min. of Proc. filed. Trial by the jury resumed. Test. of Pltf. cont. and concluded. Pltf. rests. Deft. Harris moves for a directed verdict. Overruled. Deft. Seaway moves for a directed verdict. Sustained. Deft. Harris w/d cross claim against Seaway. Deft. rests. Pltf. opening argument. Deft. closing argument. Pltf. closing argument. Jury charged. Jry deliberates. Ct. in recess until 9:30 a.m. 5-6-76.

May 6. Min of Proc. filed. Hung jury. Jury excused. Ct. will advise to new trial date. Pltf. ex. admitted 2-10, 13,15,16,20,22-24,27,28,31, 36-38; Deft. ex. admitted A-E. ex in room 214

May 7. Notice of trial date at 10:00 a.m. Mond. June 14th, 1976 at Toledo filed. Copies to Philo, Gallon, Raker.

May 14. 1 Civil Subpoena to Produce etc. returned SERVED 4-26-76 to Edward Clower, Safety Rep., filed. Marshal fees $4.40.

June 1. Pltf. mo to assess costs fld.

June 1. Pltf. Memo. in support of mo. fld.

June 14. Pltfs. proposed instr. fld.

June 14. Deft. memo. in opposition to pltfs motion to assess costs and/or grant alternative relief, filed. Copies mailed.

June 14. Min of Proc. fld. Jury impaneled and sworn. Deft. moves for separation of witnesses. Opening statements made. Evid. of Pltf. begun.

June 15. Min of Proc. fld. Trial by the jury cont. Evid. of Pltf. cont. and concluded. Pltf. rests. Deft. moves for directed verdict. R.R. Evid. of Deft. begun and concluded. Deft. rests. Pltf. rebutts. All parties rests Deft. renews motion for directed verdict. Overruled. Pltf. opening arg. Deft. closing arg. Pltf. closing arg. Jury charged. Jury deliberates.

June 16. Min. of proc. fld. Jury deliberating. Jury returned with verdict for the Pltf. ex. pltf. adm. 1-7,10,13,15,16,27,31,37,38, ex. in 214, ex. deft. adm. A-E.

June 16. VERDICT — In favor of pltf.

June 16. Min of Proc. fld. as to damages. Evid. of Pltf. begun and concluded. Pltf. rests. Deft. rests.

June 17. Min of Proc. fld. trial by the jury resumed. Pltf. opening arg. deft. closing arg. Pltf. closing arg. Jury charged. Jury deliberates ex. adm Pltf. 8,9,22,23,24,28,20 Jury returned. ex in 214

June 17. VERDICT - as for damages for Robert Breitner $200,000. and Luella Breitner $36,000.

June 18. Judgment on jury verdict fld. Judgment entered in favor of Pltf. R. Breitner against deft. and award the sum of $200,000. with Interest at 6% and the cost of this action. Copies to counsel.

June 18. Judgment on jury verdict fld. Judgment entered in favor of pltf. L. Breitner against deft. and award her the sum of $36,000. at the rate of 6% interest and the cost of this action. copies to counsel.

June 23. Civil Subpoena to produce etc. returned EXECUTED 4-9-76 to Richard Harris, filed. Marshal fees $2.48.

June 23. Civil Subpoena returned SERVED 6-9-76 to George Henry, filed. Marshal fees $8.72.

June 23. Memo. and order of the Court, filed. DJY 77(d) copies to Philo, Raker. Ordered that motion of pltfs to assess costs is denied.

June 25. Def. mo. for judgment notwithstanding the verdict, fld. c.m.

July 16. Pltf. memo in opp. to motion for judgment non obstante verdicto, fld. c.m.

July 21. Pltfs. notice of taxation of costs, filed. Copies mailed. Attached Bill of Costs, Affidavit of Nicholas J. Rine.

August 2. Deft. motion for extension of time to August 16, 1976, filed. NJW for DJY. Copy to Moan.

August 13. Brief of deft. on motion for judgment notwithstanding the verdict, filed. Copies mailed.

August 27. Stip & ORDER: pltf. have time to file opp. to Sept. 10, 1976, fld. c.m.

September 10. Pltf. brief in opposition to deft's motion for judgment N.O.V., filed. Copies mailed.

October 21. Reply brief of def. Harris, fld. c.

October 21. ORDER Setting time for oral argument: hearing be set for Thursday, Oct. 28, 1976 at 1:30 p.m., f.o. each side granted 1 hr. for argument, fld. DJY,J. C.M.

October 28. Min. Proc: Hearing on motion re judgment notwithstanding verdict. 1 hr. each side. Pltf. opening statement. Def. closing argument. Pltf. closing argument. Court discusses matters with counsel. Court adjourned.

1977

February 15. OPINION AND ORDER: Def. mo. for judgment n.o.v. is hereby sustained; F.O. judgments entered for pltfs. June 17, 1976, are hereby VACATED, SET ASIDE, AND HELD FOR NAUGHT, and it is, F.O. Clk. shall enter judgment in favor of defendant., fld. DJY, J. c.m.

February 15. Judgment entered in favor of def. against pltf., fld. c.m.

March 15. Notice of Appeal

APPENDIX B

OPINION AND ORDER

(In The United States District Court
For The Northern District of Ohio
Western Division)

(Filed February 15, 1977)

YOUNG, J:

This action arises out of an accident which happened on October 3, 1972, on the site of a construction project in Toledo, Ohio. The plaintiffs, who are husband and wife, seek damages for personal injuries to the plaintiff Robert Breitner, hereafter referred to as the plaintiff, and loss of consortium to the plaintiff Luella Breitner. There were originally two defendants, Richard Harris, hereafter referred to as the defendant, who was the owner of the premises and also the general contractor for the construction property, and Seaway Scaffold Company, a supplier of equipment.

Although this Court is now satisfied that the case should never have been submitted to a jury at all, in fact it was tried to a jury twice. At the first trial, the Court sustained the motion of the defendant Seaway Scaffold Company for a directed verdict in its favor at the close of the plaintiffs' case. The trial resulted in a hung jury. Thereafter, a bifurcated trial was had, at which the jury first found the defendant liable, and then assessed the plaintiffs' damages in the sums of $200,000.00 for Robert Breitner and $36,000.00 for Luella Breitner.

The defendant filed a timely motion for judgment notwithstanding the verdict, which was briefed and also was argued orally by the parties. The Court finds that the motion is well-taken, and should be granted.

The evidence showed that at the time of the accident, the plaintiff was a journeyman carpenter with somewhat over nineteen years of experience, but without formal apprenticeship or other training. He was an employee of 4-Square Builders, the carpentry subcontractor on the defendant's building project, the construction of a large motel. One of the owners of 4-Square Builders, George Henry. was also employed by the defendant as his general superintendent on the job.

The accident happened while the plaintiff was at work installing windows on an upper floor of the building. He was inside the building. Outside the building one of the subcontractors had erected scaffolding, consisting of tubular metal support some ten feet high, placed about twelve feet apart, and standard scaffold planks sixteen feet long, one foot wide, and one and a half inches thick. Only a single plank was used for the scaffolding outside the window.

The specific safety standards for scaffolding of the Ohio Industrial Commission require that for scaffolding of the height involved, vertical supports may be no more than eight feet apart, and at least two standard planks must be used, cleated together, and equipped with toe-boards and guard rests.

While plaintiff was inside the building, his helper was outside standing on the rough plank, trying to fit a window unsuccessfully. The plaintiff stepped out onto the plank, took a power saw, and squatted down preparatory to making a cut with the saw. At that point the plank broke. The plaintiff fell to the ground, suffering serious injuries.

Under the law of Ohio, the plaintiff was covered by Workmen's Compensation provided by his employer,

4-Square Builders. However, the Ohio Workmen's Compensation law does not bar a workman injured in covered employment from bringing an action against a third party independent of his employer for negligently causing his injuries. Neither the employer nor the workmen's compensation fund have any right of subrogation in connection with the injured workmen's claims against independent third parties.

Acting under this law, the plaintiff commenced this action against the defendant as an independent third party. While there appears to this Court to be considerable conflict between this claim that the defendant was a contractor independent of plaintiff's employer and plaintiff's claims that his employer was not a contractor independent of the defendant, it is not necessary to resolve this dilemma, or to give it any further consideration, in order to reach a proper conclusion in this case.

The plaintiff asserts a number of specifications of negligence on the part of the defendant as follows:

A. he negligently failed to employ a careful carpentry contractor;

B. he violated his non-delegable duty to provide plaintiff with a safe place to work or to exercise due care for his safety;

C. he was negligent in exercising the control which he retained;

D. he failed to warn plaintiff of hazardous conditions and equipment of which he was aware or should have been aware in the exercise of due care and of which plaintiff was unaware;

E. he gave ambiguous orders and acquiesced in negligent methods of work;

F. he failed to conform to applicable construction safety statutes and regulations.

An examination of the case law in this area reveals that these specifications are standard specifications used with slight variations, by the plaintiffs-counsel in bringing actions for injured employees of subcontractors against owners or general contractors. They have been analyzed and considered both by the appellate courts of Ohio and the Sixth Circuit Court of Appeals. Unfortunately, defendant's counsel did not direct the attention of this Court to those authorities until after the second trial of this case, by which time the Court's own tardily taken research had disclosed them.

Plaintiffs' chief counsel is a very expert, experienced, and learned attorney, who by his research has become convinced that the toll of accidental injuries in the construction industry could be vastly reduced if the courts and legislatures would relieve workmen of any responsibility for their own safety, and require owners or general contractors to stand constant guard over them. In support of this thesis, he has published writings, notably one article "*Revoke the Legal License to Kill Construction Workers*" XIX DePaul L. R. 1 (Autumn, 1969). He has also located safety experts schooled in "risk recognition," such as the witness Jenkins who testified in this case. These experts believe that ordinary construction workers are totally incapable of recognizing the risks involved in their daily work, and are not ordinarily reasonable and prudent persons. While the conduct of the plaintiff in this case certainly gives powerful support to the witness Jenkins's views, this

Court is reluctant to believe that all construction workers are as heedless of their own safety, and lacking in understanding of their trade, as the plaintiff Robert Breitner appeared to be.

The problem from a legal standpoint is that once one departs from the field of workmen's compensation or employer's liability law, where legislative action has restricted or eliminated the common-law doctrines of assumption of the risk, the fellow-servant rule, and contributory negligence, those rules remain applicable to any other on-the-job negligence cases presented to the courts. This Court is reluctant to eliminate those doctrines by judicial fiat even if, as a trial court judge, he were at liberty to do so. If the theories of plaintiffs' chief counsel are to become law, this ought to be accomplishd by legislative action. This Court is very well acquainted with the legislative process. It is perhaps more tedious and complicated than the judicial one, but it can be learned and employed very effectively by those who really desire to do so. In most cases, the legislature can overrule the decision of the highest court, as witness the recent action by the Congress in overruling the decision of the Supreme Court in the case of *Alyeska Pipeline Service Co.* v *The Wilderness Society*, 421 U.S. 420 (1975).

In any event, even if this Court were to yield to the plaintiffs' arguments and attempt to make a new law, it is precluded from doing so by the decisions of the higher courts. In the case of *Cuppy* v *The Lathrop Co*, C.A. No L-75-170 (Lucas Cty Ct App, filed Apr. 26, 1976), a case factually on all fours with the present case, that Court affirmed a judgment of the common pleas court directing a verdict in favor of the defendants at the close of the

plaintiffs' case. Although the affirmance was primarily upon the ground that the plaintiff as a matter of law had assumed the risk and was guilty of contributory negligence, in accordance with the technical requirement of the Ohio law that it rule upon all errors assigned, it considered the plaintiffs' specifications of negligence, which were substantially the same as those in the present case, and found no negligence in respect to any of them.

In its decision, which in this diversity case is binding upon this Court, the Ohio court of appeals relied heavily upon the decision of the United States Court of Appeals for the Sixth Circuit in *Gowdy* v *United States*, 412 F 2d 525 (1969). In that Federal Tort Claims Act case, plaintiff, an employee of a contractor which had a contract with the coast guard to install machinery in a lighthouse on Lake Michigan, fell at work and was injured. He fell from a flat roof with no guard rail, a situation very much like the plaintiff Robert Breitner's fall from an obviously shaky and overloaded scaffold.

In his complaint, Gowdy made the following specifications of negligence:

> 1. In hiring an incompetent contractor; (substantially the same as specification A herein).
>
> 2. In not exercising reasonable care in the performance of its right of control over plaintiff's employer; (substantially the same as specification C herein).
>
> 3. In furnishing unsafe equipment; (similar to specification F herein).
>
> 4. In giving ambiguous orders to an independent contractor; (similar to specification E herein).

5. In failing to warn plaintiff of the dangerous condition of the lighthouse; (similar to specification D herein).

6. In failing to provide a reasonably safe place to work; (similar to specification B herein).

The court of appeals carefully analyzes all of these specifications, and finds them to be without substance in the law. It also carefully considers the question of contributory negligence. The district court has found no contributory negligence, accepting the view of plaintiff's safety experts that a workman's attention would be concentrated almost exclusively on his work effort, and thus lulled into a sense of security he would easily be lured into a position of danger. It is hard to see how this argument can be squared with the basic doctrine of negligence law that as the danger to be foreseen in what is being done increases, so the amount of caution required in the exercise of ordinary care increases, but that is perhaps aside from the point. The plaintiff here argues the same position that the trial court took in the *Gowdy* case. The majority of the court of appeals in *Gowdy* says "Although this statement has some emotional appeal, it will not withstand analysis." (P. 535). A judgment of the district court in favor of the plaintiff was reversed, and the cause was remanded with instructions to dismiss the complaint.

This Court fully accepts and entirely agrees with these two decisions of the courts of appeals. It is ashamed that it accepted without analysis the contentions of the plaintiffs, and thus caused the trouble and expense of two jury trials of this cause, when the matter should have been resolved, at the latest, at the close of the plaintiffs' case in chief at the first trial.

This Court will attempt to profit by its error in this case, and not repeat it in several other pending cases which involve the same situation of claims of employees of subcontractors against owners or general contractors, and present identical or similar specifications of negligence. If improvements in the safety laws are needed, a question about which this Court is not entirely convinced that the answer is in the affirmative, let them be made by the legislature, whose function to make the law ought not to be usurped by the courts, however much they may be tempted or impelled thereto by legislative indifference.

This Court has no doubt that the defendant was not guilty of negligence in any respect which directly caused the plaintiff Robert Breitner's injuries, and reasonable minds ought not to differ with a conclusion that it is negligent for an experienced journeyman carpenter to step out on a single plank, of excessive length, upon which another man is already standing. The defendant's motion for judgment notwithstanding the verdict must be sustained.

Therefore, for the reasons stated, good cause appearing, it is

Ordered that the motion of the defendant for judgment notwithstanding the verdict be, and the same hereby is, Sustained; and it is

Further Ordered that the Judgments entered for the plaintiffs Robert Breitner and Luella Breitner on June 17, 1976, be, and the same hereby are, Vacated, Set Aside, and Held For Naught; and it is

Further Ordered that the clerk Shall Enter Judgment for the Defendant.

It Is So Ordered.

Dated: February 11, 1977. /s/ Don J. Young
At: Toledo, Ohio. *United States District Judge*

APPENDIX C

DO NOT PUBLISH

No. 77-3303

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT BREITNER and LUELLA BREITNER,
Plaintiffs-Appellants,

v.

RICHARD HARRIS, d/b/a Richard Harris Builders, and SEAWAY SCAFFOLDING COMPANY, INC.,
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed December 10, 1979.

Before: ENGEL, Circuit Judge; PECK, Senior Circuit Judge, and BROWN, District Judge.*

ENGEL, Circuit Judge. Robert Breitner, a journeyman carpenter with nineteen years experience, was injured when scaffolding onto which he had stepped broke, causing him to fall ten feet to the ground. At the time of the accident, Breitner was employed by Four-Square Builders, the carpentry subcontractor on a building project for the construction of the Sheraton-Westgate, a motel-office-shopping complex in Toledo, Ohio. Breitner was working with an assistant, John Nearing, an apprentice carpenter, installing upper floor windows of the motel. Nearing was positioned on the scaffolding outside

* Hon. Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

while Breitner was inside, lining up the measurements for the installation. At one point, Nearing had difficulty fitting a window within the opening in the building. Breitner gave instructions, but when he realized that Nearing did not understand them, Breitner undertook to modify the window opening himself. Breitner stepped out of the window onto the scaffolding, which moments thereafter broke, plunging him to the ground.

The proofs showed without dispute that the scaffolding in question was approximately ten feet high, with a single plank of scaffold grade lumber, sixteen feet long, one foot wide and 1½ inches thick spanning a distance of approximately 12 feet between tubular metal supports. It is undisputed that a 12-foot span for a plank of those dimensions was unsafe. The plank itself was not defective in any manner.

Under Ohio law, plaintiff was covered by Workmen's Compensation insurance provided by Four-Square, and he received an appropriate award from that source. However, Ohio law does not bar a workman injured in covered employment from bringing an action against a third party, independent of his employer, for negligently causing the injuries which gave rise to a workmen's compensation award. *Thompson* v. *Ohio Fuel Gas Co.*, 11 Ohio App. 2d 212, 229 N.E.2d 756 (1964). *Levy* v. *Coon*, 11 Ohio App. 2d 200, 229 N.E. 2d 747 (1964). Apparently neither the covered employer nor the workmen's compensation fund have any right of subrogation to the injured workman's claim against independent third parties. *See Fischer Construction Co.* v. *Stroud*, 175 Ohio St. 31, 191 N.E. 2d 164 (1963); *Truscon Steel Co.* v. *Trumbull Cliffs Furnace Co.*, 120 Ohio St. 394, 166 N.E. 368 (1929). Breitner brought suit against the general contractor, Richard Harris, d/b/a Richard Harris Builders, and against Seaway Scaffolding Company, Inc., which had furnished the scaffolding materials.

The complaint charged Harris with the following negligent conduct:

a. he negligently failed to employ a careful carpentry contractor;

b. he violated his non-delegable duty to provide plaintiff with a reasonably safe place to work, or to exercise due care for his safety;

c. he was negligent in exercising the control which he retained;

d. he failed to warn plaintiff of hazardous conditions and equipment of which he was aware or should have been aware in the exercise of due care and of which plaintiff was unaware;

e. he gave ambiguous orders and acquiesced in negligent methods of work;

f. he failed to conform to applicable construction safety statutes and regulations.

Plaintiffs' claim against defendant Seaway Scaffolding Company is that Seaway failed to furnish adequate instructions for the construction of the scaffolding.

The district court directed a verdict for the defendant Seaway and, after a jury verdict for the plaintiff, entered judgment n.o.v. for defendant Harris. In his memorandum opinion granting judgment n.o.v. for defendant Harris, the district judge wrote:

> This Court has no doubt that the defendant [Harris] was not guilty of negligence in any respect which directly caused the plaintiff Robert Breitner's injuries, and reasonable minds ought not to differ with a conclusion that it is negligent for an experienced journeyman carpenter to step out on a single plank, of excessive length, upon which another man is already standing.

In so ruling the court relied upon an unreported decision of the Lucas County Court of Appeals in *Cuppy* v. *The Lathrop*

Co., CA No. L-75-170 (Lucas County Court of Appeals, filed April 26, 1976), which it found to be on all fours with the present case.

I. RELIANCE UPON CUPPY

The parties agree that under the Erie doctrine, Ohio law applies in this diversity case. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Nevertheless, plaintiffs assert that the district judge's reliance upon *Cuppy* was improper because that decision is an unreported intermediate appellate court decision.

In *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948), the Supreme Court ruled that in a diversity case, the federal courts are not bound under the Rules of Decision Act, 28 U.S.C. § 725, now 28 U.S.C. § 1652 (1956), to follow the decision of a state trial court. In *King* the state court decision claimed to be controlling was that of a court of common pleas of South Carolina. It had neither been indexed nor reported. Observing that there was no authority in South Carolina law which would make the decision of a state trial court binding in any way on any other court of the state, the Supreme Court found "it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court." *King* v. *United Commercial Travelers, supra*, 333 U.S. at 161. It is undisputed that under Ohio law opinions rendered by district courts of appeal are not binding on courts of appeal in other districts.[1] *Hogan* v. *Hogan*, 29 Ohio App. 2d 69, 278 N.E. 2d 367 (1972).

Plaintiffs also urge that Ohio Rev. Code Ann. § 2503.20 expressly precludes *Cuppy* from having any precedential effect. Section 2503.20 provides that "[a]fter August 15, 1919, all such cases must be reported in accordance with this section before they shall be recognized by and receive the official

[1] There are eleven judicial districts in Ohio, Ohio Rev. Code Ann. § 2501.01.

sanction of any court." However, in *Gustin* v. *Sun Life Assurance Co.*, 154 F.2d 961 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946), this provision was found to be directory in nature and not mandatory.

We agree with the plaintiffs that *Cuppy* was not binding upon the district court here. However, we do not find that it was error for the court to consider *Cuppy*. We believe that the rationale expressed by the Supreme Court in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967), provides the appropriate and altogether sensible rule:

> [E]ven in diversity cases this Court has further held that while the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. *King* v. *Order of Travelers, supra*, at 160-161. And in *West* v. *A. T. & T. Co.*, 311 U.S. 223 (1940), this Court further held that "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" At 237. (Emphasis supplied.) Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. . . .
>
> [T]he State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956).

See also Winston Corp. v. *Continental Casualty Co.*, 508 F.2d 1298, 1302 (6th Cir.), *cert. denied*, 423 U.S. 914 (1975); Wright, Law of Federal Courts, § 58 at 267-71, 3rd ed. 1976; 1A Moore's Federal Practice ¶ 10.307[2] at 3088-89 (1979).

This court has repeatedly recognized that a district judge's construction of state law is entitled to considerable deference. In *Lenoir* v. *Porters Creek Watershed District,* 586 F.2d 1081, 1093 (6th Cir. 1978), we wrote that:

> [i]n the absence of any precise decisional law on the issue, we accord considerable weight . . . to the interpretation of the law of [a state] by a federal district judge located in that state who, therefore, would be possessed of a greater sensitivity to that state's interpretation of its own laws.

Citing *Martin* v. *University of Louisville,* 541 F.2d 1171 at 1176 n. 7 (6th Cir. 1976) and cases cited therein. *See also, e.g., Bishop* v. *Wood,* 426 U.S. 341, 346 & n. 10 (1976); *Insurance Co. of North America* v. *Federated Mutual Insurance Co.,* 518 F.2d 101, 106 & n. 3 (6th Cir. 1975); *Rudd-Melikian, Inc.* v. *Merritt,* 282 F.2d 924, 929 (6th Cir. 1960).

In short therefore, we hold that while *Cuppy* was by no means controlling, as suggested by the district judge, he was nonetheless entitled to consider it for what it was worth under the circumstances. It was obviously entitled to less weight than a decision which was regularly reported, or a decision of the highest court of Ohio. It was, at the same time, not improper for the trial judge to refer to *Cuppy* in a federal diversity case, concluding as he did that *Cuppy* fairly represented the law of Ohio as expressed by that state's highest court.

II. SEAWAY'S NEGLIGENCE

In directing a verdict for the defendant Seaway, Judge Young held there was no evidence whatever of negligence on the part of Seaway Scaffolding Company. Suffice it to say that we agree entirely. Seaway furnished the scaffolding to Harris,

but Seaway admittedly was not responsible for its erection. It was further admitted that there was no defect in the supplied equipment. Instead plaintiffs claimed only that Seaway failed to provide adequate instructions for assemblage of the scaffolding. In fact, instructions were furnished, and they were not shown to be inadequate. Furthermore no evidence was adduced to indicate that any insufficiency in the instructions bore in any way upon the ultimate negligent construction of the scaffold in question.

III. HARRIS' NEGLIGENCE

The facts concerning ownership and control of the premises here are somewhat unusual. Title to the property itself, at least during the construction phase, was in Harris and his wife. Harris was sued in his capacity as an individual doing business as Richard Harris Builders, and as the general contractor for the project. As the general contractor Harris contracted for the carpentry work with Breitner's employer, Four-Square Builders, Inc., a corporation. One of the owners of Four-Square was George Henry. Henry was also individually hired by Harris as the general superintendent of the project, and Henry was actively engaged in that capacity on behalf of Harris. While Henry was one of the co-owners of stock in Four-Square, it was not shown whether he was also an officer or an employee of Four-Square. Henry's role, in this construction project in any event, appears to have been as an on-the-scene supervisory agent for Harris.

The evidence showed that the scaffolding was erected by carpenters and employees of Four-Square Builders, Breitner's employer. To the extent that the responsibility for his injuries was that of Four-Square, Breitner's sole recourse was in his recovery of a Workmen's Compensation award. There is, however, some evidence that Henry, as Harris' general supervisor, undertook not only supervision of the construction details but also of the safety and working conditions of

the subcontractors including Four-Square. Thus it was shown that on a previous occasion Henry had actually required other scaffolding to be torn down and to be rebuilt safely. While Henry denied having observed the scaffolding in question prior to the accident, plaintiff's co-worker, John Nearing, testified that Henry had been in the vicinity of the scaffolding earlier, raising at least an inference that his supervision should reasonably have included an examination of the scaffolding in question. To the extent that such a responsibility was undertaken, Henry's conduct, if negligent, was attributable to Harris under the doctrine of *respondeat superior*. It is unquestioned that Henry acted as general supervisor of the project under an express designation of that authority by Harris. There was no showing that Henry was acting only as an employee or representative of the subcontractor Four-Square. Under these circumstances, we believe that the issue of Harris' responsibility for the safety of the premises and for the safety of the scaffolding was properly one for the jury. *See Parsons* v. *Blount Bros. Construction Co.*, 281 F.2d 414 (6th Cir. 1960).

In *Parsons*, the plaintiff was electrocuted when a hydrocrane with which he was working came into contact with a high voltage wire strung overhead at the construction site. *Parsons'* theory of liability was that the general contractor, Blount, and its safety engineer were responsible for correcting any safety hazards which were in the area, and that Blount knew or should have known of the danger inherent in the maintenance of overhead uninsulated high tension wires in close proximity to men working with cranes. Plaintiff there invoked Ohio's frequenter statute, and its requirement that the owner or controller of premises furnish workers with a reasonably safe place in which to work. Even though Parsons was working for a subcontractor, Judge Weick, writing for the court, found that the duty of the principal contractor in control of the jobsite extended to an employee of the subcontractor, or at least was a question for the jury:

> Plaintiff had only sought to show that defendant controlled safety features and abatement of hazards. If this were true it would be immaterial that defendant did not have control over other aspects, as to the method of carrying out the work, exclusive of safety.
>
> • • •
>
> In view of all this evidence, in our judgment, it was for the jury to say whether Blount, having custody of the job site, also had control thereof. Robinson v. Republic Steel Corporation, Ohio App. 1948, 78 N.E.2d 381.
>
> • • •
>
> Whether Blount was negligent in failing to furnish decedent a reasonably safe place in which to work was for the jury to determine. It was for them to decide whether the conditions heretofore discussed constituted a hazard which Blount, in the exercise of ordinary care, could have eliminated.

281 F.2d at 416-18.

The circumstances here are admittedly not as strong as those which brought about a reversal and remand for trial in *Parsons*. The safety engineer more clearly acknowledged his responsibility in *Parsons* than did Mr. Henry here. The scaffolding here was not a permanent part of the premises but was moved about from place to place by Four-Square's carpenters who had the primary responsibility for its proper erection. Nevertheless, Harris procured the scaffolding and, through Henry, undertook at least some supervisory responsibility for its safe use. This was logical, as the proofs showed that use of this scaffolding by other subcontractors on the scene, such as brickmasons, was also contemplated. In consequence we conclude that the questions of Henry's negligence, and of Harris' responsibility therefor were properly for the jury. The question of Breitner's contributory negligence, however, is another matter.

IV. BREITNER'S CONTRIBUTORY NEGLIGENCE

This case appears to have been pleaded, tried, and submitted to the jury upon issues of negligence and contributory negligence. Ohio also recognizes the doctrine of assumed risk and its application here is argued on appeal. Ohio recognizes a difference between the two concepts: " 'Contributory negligence' and 'assumption of risk' are not synonymous terms . . . . The former is based on carelessness, the latter on venturousness." *Porter* v. *T. Railroad Co.*, 152 Ohio St. 463, 90 N.E.2d 142, 143 (1950).

At the same time Ohio recognizes that contributory negligence and assumption of risk, though not synonymous, are not necessarily mutually exclusive. *Wever* v. *Hicks*, 11 Ohio St.2d 230, 228 N.E.2d 315 (1967); *Ricks* v. *Jackson*, 169 Ohio St. 254, 159 N.E.2d 225 (1959). *See also Dunn* v. *Higgins*, 14 Ohio St. 239, 237 N.E.2d 386 (1968). We note also that the Ohio Supreme Court has held that the common law defenses of contributory negligence and assumption of risk are available as a defense to liability under the frequenter statute, Ohio Rev. Code Ann. § 4101.11. *See Westwood* v. *Thrifty Boy Super Markets, Inc.*, 29 Ohio St. 2d 84, 278 N.E.2d 673 (1972).

Ohio appears to follow generally accepted tort principles that contributory negligence on the part of a plaintiff which proximately resulted in the occurrence of the plaintiff's injury is an absolute bar to recovery in a negligence action. This denial of recovery is not premised upon the notion that the defendant is relieved of any duty toward the plaintiff, but rather that "the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law both parties are at fault; and the defense is one of the plaintiff's disability rather than the defendant's innocence." *Lazar* v. *Cleveland Illuminating Co.*, 43 Ohio St. 2d 131, 331 N.E.2d 424, 426 (1975), quoting Prosser, Law of Torts (4th Ed.), 417, Section 65.

In *Lazar*, the Ohio Supreme Court accepted Section 466 (a) of the Restatement of Torts, 2d, as illustrative of Ohio law:

> The plaintiff's contributory negligence may be either
> (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or
> (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.

While no doubt there are circumstances in which the separate doctrines of contributory negligence and assumption of risk may under Ohio law produce different results, *see, e.g., Morris* v. *Cleveland Hockey Club*, 157 Ohio St. 225, 105 N.E. 2d 419 (1952), and while Breitner's act of stepping onto the single planking when a co-worker was already on it might be construed as "venturousness", it is equally and perhaps preferably analyzed in terms of whether he used reasonable care for his own safety and whether reasonable minds could differ concerning this conclusion.

In granting judgment n.o.v. for defendant Harris, District Judge Young found that: "Reasonable minds ought not to differ with a conclusion that it is negligent for an experienced journeyman carpenter to step out on a single plank, of excessive length, upon which another man is standing." In reaching this conclusion, Judge Young relied principally upon *Cuppy, supra*, a case he found to be "on all fours" with the instant case. The court in *Cuppy* in turn relied principally upon a decision of this court, *Gowdy* v. *United States*, 412 F.2d 525 (6th Cir.), *cert. denied*, 396 U.S. 960 (1969).

In *Cuppy*, a journeyman electrician with many years experience in the construction industry ascended a 12-foot ladder

placed through an opening in an acoustical ceiling to perform electrical work on the structural ceiling, which was approximately six feet above the false ceiling. The ladder unexplainedly rocked while the plaintiff stood near its top. The plaintiff thereupon grasped a pencil rod hanger near him, the acoustical ceiling gave way, and he fell to the floor. The court held that the plaintiff "was an experienced journeyman electrician with full knowledge of such equipment as the ladder involved herein and scaffolds. He chose to use the ladder rather than request the scaffold or some other means of performing his work. The Appellant's conduct was negligence as a matter of law . . . ."

Gowdy involved an action for personal injuries under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, *et seq*. While working on the roof of a machinery house which formed part of a Lake Michigan lighthouse, plaintiff Gowdy lost his balance and fell to the ground. The Sixth Circuit reversed a district court decision that the United States was negligent in failing to maintain guard rails on the roof, finding the hazard to have been open and obvious to the plaintiff. Although *Gowdy* primarily involved Michigan negligence law, the court in *Cuppy* found the decision to be equally applicable in Ohio.

Although neither of these cases appear to us to be precisely on all fours with the present case, they do repeat the kind of analysis to be undertaken when an experienced workman incurs a job-related injury. The knowledge and experience of the plaintiff cannot be ignored in evaluating his conduct. We agree with the district court that the plaintiff here acted negligently as a matter of law, and that no reasonable person could conclude otherwise. That his injuries may have induced the jury out of sympathy to disregard the plain facts and the court's instructions is perhaps understandable, but it is precisely this circumstance for which the law provides the remedy accorded here by the district judge.

We recognize that the question of contributory negligence is normally one for the jury. In *Lazar, supra,* 331 N.E. 2d 433, the Ohio Supreme Court wrote:

> A finding of contributory negligence on the part of a plaintiff involves the interplay of complex, and perhaps contradictory, factors. In addition to the knowledge imputed to the plaintiff, one must consider any special knowledge on his part, any external indicia which warns of danger, the culpability of the defendant, and the totality of circumstances under which the accident occurred. These are considerations uniquely tailored to the jury function. Absent evidence so clear that reasonable minds could not differ with regard to it, a holding that conduct is contributorily negligent as a matter of law is improper.

Although the cases in which a finding of contributory negligence as a matter of law is proper may be few, our examination of the authorities convinces us that Ohio judges have not been unwilling to rule on the question as a matter of law where the evidence admitted of no other reasonable conclusion than that of the plaintiff's own negligence, especially where the plaintiff, like Breitner here, acted knowledgeably and in deliberate disregard of an obvious danger.[2]

Whatever may have been Henry's obligation as project supervisor, the facts are undisputed that the carpenters at

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[2] Curiously, neither party in this litigation invoked Ohio's "frequenter" statute, Ohio Rev. Code Ann. § 4101.01. *et seq.*, imposing upon employers the duty to furnish a safe place of employment and defining an employer as one "having control or custody of any employment, place of employment, or employee."

We accept, however, the ruling of Ohio case law, that

> At least with respect to "frequenters", the Ohio appellate courts have not regarded those statutes as exacting a duty substantially different from that imposed generally by Ohio law upon an owner of property towards an invitee.

Ford Motor Co. v. *Tomlinson*, 229 F.2d 873, 879 (6th Cir.), *cert. denied*, 352 U.S. 826 (1956). *See also Moore* v. *Denune & Pipic, Inc.*, 26 Ohio St. 2d 125, 269 N.E. 2d 599 (1971).

Four-Square were primarily responsible for erecting the scaffolding. Although Breitner minimized his experience with this type of scaffolding, insisting that he usually worked on scaffolding which was affixed directly to the building rather than on independent framing, there was no evidence to indicate that the safety principles which show the danger inherent in spanning a 12-foot distance with a single plank but 1½ inches thick are any different when scaffolding is attached to the building than they are when the staffolding stands on its own frame. There is no reason to believe that anyone in the construction area would have more knowledge concerning the safety of the operation than the plaintiff himself, who was one of the class of persons charged with the responsibility of erecting the scaffolding. The plank itself was without any inherent or latent defect. It was made of material with which the plaintiff's trade commonly dealt. The testimony is overwhelming that it was obviously negligent to have erected the scaffolding in this manner. Both Richard Harris and plaintiff's safety expert, Robert Jenkins, recognized this. Harris stated:

> Have you ever stood on a plank spanning an eight-foot span of one width and expected that to suffice? If you have, you know it does not take manuals and codes to understand the situation. In other words, it bounds up and down like a diving-board. So good common horse sense tells you to double the planking and the width before you get on it.

Plaintiff's expert, Mr. Jenkins, testified as follows:

> Q. Have you ever seen that type of scaffolding as I have described to you that existed that day at the "Sheraton-Westgate"; have you ever seen that exist?
> A. Oh, yes.
> Q. And you ordered it stopped?
> A. Right.
> Q. Why?

A. For the same reason. There is a long history of carpenters injured from this very cause, the very circumstances.

George Henry, armed only with a high school education and experience as a carpenter, readily admitted that he had ordered scaffolding torn down when he observed it was erected with but a single plank:

Q. (Continuing) Did you ever observe any scaffolding erected on this job with a single plank decking?

A. Yes, once or twice, and I had it torn down and had it rebuilt properly.

• • •

Q. Did you ever instruct any workers to use double-plank scaffolding?

A. Yes.

Q. Who?

A. All the carpenters.

Q. You instructed them?

A. Yes. We had one tore down about two weeks before this accident and rebuilt properly with handrails. This was on the front of the building.

Q. Who were the carpenters involved in that?

A. There was about six or seven there, including Mr. Breitner.

John Nearing, the apprentice carpenter who was working with Breitner on the job and who was on the scaffolding when Breitner stepped on it, testified that there was ample scaffolding equipment, planks and rails, available to do the job. Nearing described the appearance of the plank:

Q. Can you recall when you were on the plank alone whether it sagged?

A. It definitely sagged.

Q. Tell us, if you can, about how far it sagged from level when you were on it alone?

> A. I would imagine in the neighborhood of four inches.

Nearing, who had been working on the project since summer or early fall, testified to the training he had had as an apprentice: "I was informed I had responsibility as much as anyone else to erect scaffolding properly and to use it properly for my own safety and others." Although he had considerably less experience than Breitner, he recognized the obvious risk:

> Q. . . . Can you tell us, Mr. Nearing, from your training, without reference to the code, how much weight you would be able to expect a two-by-ten plank to carry safely at a span of twelve feet?
>
> A. I would guess in the neighborhood of 200 pounds. That is just a guess, just from experience.
>
> Q. Would that include or exclude any safety factor?
>
> A. I would say it should include a safety factor.
>
> Q. Including a safety factor, a plank could only carry 200 pounds?
>
> A. Yeah, I would say so.

Finally, Breitner's own testimony, while naturally self-serving, nevertheless makes clear his awareness of the condition to which he was exposing himself. He testified that he had earlier observed the scaffolding being erected by Four-Square employees. He saw Nearing on the scaffold and his only precaution was to ask him to step over to the right.

A plaintiff's own self-serving assertions may not be sufficient in themselves to overcome a motion for directed verdict. This is especially true where, as here, the plaintiff's own statements admit of the truth of defendant's assertions. *See Pinci* v. *United States*, 316 U.S. 332 (1942).

In conclusion, therefore, we agree with the district judge that the evidence so overwhelmingly indicated a deliberate want of care for his own safety on the part of the plaintiff

that no reasonable person could conclude other than that Breitner was guilty of contributory negligence which proximately resulted in his injury, and which bars his claim.

Affirmed.